

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JENNIFER R. ZUMWALT,
Plaintiff,
v.
JO ANNE B. BARNHART,
Commissioner of Social
Security,
Defendant.

NO. CV-04-3121-LRS

**ORDER DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT AND
GRANTING DEFENDANT'S CROSS-
MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Jennifer R. Zumwalt, Plaintiff, filed concurrent Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI") applications on October 24, 2001, alleging an onset date of December 22, 1998 (Tr. 14-15). She alleged disability due to depression, anxiety, headaches, and cervical, thoracic, and lumbar strain (Tr. 22, 55-57). The applications were denied initially and upon reconsideration (Tr. 25-26). After timely requesting a hearing, Plaintiff appeared before Administrative Law Judge ("ALJ") Thomas Robinson on January 5, 2004 in Yakima, Washington (Tr. 234). At the hearing, the ALJ heard testimony from Plaintiff, represented by an attorney, and from a vocational expert, Scott Whitmer (Tr. 13). On February 11, 2004, the ALJ issued a decision finding that Plaintiff was not disabled (Tr. 18). Plaintiff requested a review of the

1 hearing decision by the Appeals Council and her request for review
2 was denied on September 24, 2004 (Tr. 4-6). Therefore, the ALJ's
3 decision became the final decision of the Commissioner, which is
4 appealable to the district court pursuant to 42 U.S.C. § 405(g). On
5 October 27, 2004, Plaintiff filed her Complaint for judicial review
6 with this Court.

7 SEQUENTIAL EVALUATION PROCESS

8 The Social Security Act defines "disability" as the "inability
9 to engage in any substantial gainful activity by reason of any
10 medically determinable physical or mental impairment which can be
11 expected to result in death or which has lasted or can be expected
12 to last for a continuous period of not less than twelve months." 42
13 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that
14 a claimant shall be determined to be under a disability only if her
15 impairments are of such severity that the claimant is not only
16 unable to do her previous work but cannot, considering claimant's
17 age, education and work experiences, engage in any other substantial
18 gainful work which exists in the national economy. 42 U.S.C. §§
19 423(d)(2)(A), 1382c(a)(3)(B).

20 The Commissioner has established a five-step sequential
21 evaluation process for determining whether a person is disabled. 20
22 C.F.R. §§ 404.1520, 416.920. Step one determines if she is engaged
23 in substantial gainful activities. If she is, benefits are denied.
24 20 C.F.R. §§ 404.1520(b), 416.920(b). If she is not, the decision
25 maker proceeds to step two, which determines whether the claimant
26 has a medically severe impairment or combination of impairments. 20
27 C.F.R. §§ 404.1520(c), 416.920(c).

28 If the claimant does not have a severe impairment or

1 combination of impairments, the disability claim is denied. If the
2 impairment is severe, the evaluation proceeds to the third step,
3 which compares the claimant's impairment with a number of listed
4 impairments acknowledged by the Commissioner to be so severe as to
5 preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(d),
6 416.920(d); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment
7 meets or equals one of the listed impairments, the claimant is
8 conclusively presumed to be disabled.

9 If the impairment is not one conclusively presumed to be
10 disabling, the evaluation proceeds to the fourth step, which
11 determines whether the impairment prevents the claimant from
12 performing work she has performed in the past. If the claimant is
13 able to perform her previous work, she is not disabled. 20 C.F.R.
14 §§ 404.1520(e), 416.920(e). If the claimant cannot perform this
15 work, the fifth and final step in the process determines whether she
16 is able to perform other work in the national economy in view of her
17 age, education and work experience. 20 C.F.R. §§ 404.1520(f),
18 416.920(f). *See Bowen v. Yuckert*, 482 U.S. 137 (1987).

19 The initial burden of proof rests upon the plaintiff to
20 establish a *prima facie* case of entitlement to disability benefits.
21 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971). The initial
22 burden is met once a claimant establishes that a physical or mental
23 impairment prevents her from engaging in her previous occupation.
24 The burden then shifts to the Commissioner to show (1) that the
25 claimant can perform other substantial gainful activity and (2) that
26 a "significant number of jobs exist in the national economy" which
27 claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
28 Cir. 1984).

STANDARD OF REVIEW

"The [Commissioner's] determination that a claimant is not disabled will be upheld if the findings of fact are supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir. 1988). "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On review, the court considers the record as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

It is the role of the trier of fact, not this court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the court must uphold the decision of the ALJ. *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1987).

ISSUES

Plaintiff contends that the Commissioner erred as a matter of law. Specifically she argues that:

1. The ALJ erred by improperly rejecting the opinion of her treating physicians.

2. The ALJ erred by providing an incomplete hypothetical to the Vocational Expert [VE] at the hearing.

This Court must uphold the Commissioner's determination that the claimant is not disabled if the Commissioner applied the proper legal standards and there is substantial evidence in the record as a whole to support the decision.

STATEMENT OF FACTS

The facts have been presented in the administrative transcript, the ALJ's decision, and the briefs of both Plaintiff and Defendant. This court will recite those facts summarily here.

1. Plaintiff's Background and Hearing Testimony

At the time of the hearing, Plaintiff was 30 years old, and classified as a "younger person" under the Social Security Act. See 20 C.F.R. §§404.1563(c), 416.963(c). She has a general equivalency degree [G.E.D.] (Tr. 15) and was involved in a motor vehicle accident on December 16, 1998 (Tr. 139). She has been diagnosed with a variety of physical and mental impairments including depressive disorder, anxiety disorder, chronic cervical/thoracic/lumbar strains, chronic post-traumatic headaches, and right arm brachial plexus compression (Tr. 22). Her past relevant work experience includes a sander, food preparer, and fast food manager trainee (Tr. 15). Plaintiff testified that she recently underwent a divorce from her husband of 11 ½ years. (Tr.

1 241). She stated at the hearing that she has three dependent
2 children living with her (Tr. 242). Plaintiff also testified that
3 working even part time, i.e. babysitting, McDonalds, was too
4 stressful for her (Tr. 249, 251).

5 **2. Vocational Testimony**

6 Mr. Scott Whitmer was given three different hypotheticals at
7 the hearing with regard to the residual functional capacity
8 determination. (Tr. 21). First, the ALJ asked Mr. Whitmer to
9 consider a claimant who can occasionally lift and/or carry 10
10 pounds, frequently lift and/or carry 5 pounds, and needs to
11 alternate between sitting and standing every 30 minutes. Second,
12 the ALJ asked Mr. Whitmer to consider a claimant who can perform a
13 full range of sedentary work (occasionally lift and/or carry 10
14 pounds, frequently lift and/or carry 10 pounds, stand and/or walk at
15 least 2 hours in an 8-hour workday, and sit about 6 hours in an 8-
16 hour workday) with limited social interaction. Tr. 21. Third, the
17 ALJ asked Mr. Whitmer to consider a claimant who can perform a full
18 range of sedentary work with limited social interaction as well as
19 moderate mental limitations as assessed by DDS (Tr. 21, 185-86).

20 Mr. Whitmer testified that when using the first hypothetical,
21 there were no jobs the claimant could perform (Tr. 21). He testified
22 that when using the second hypothetical, the claimant could perform
23 work as a sack repairer (DOT# 782.687-046; sedentary; unskilled) for
24 which there are 186,000 jobs in the United States and less than 100
25 jobs in the State of Washington. Id. Mr. Whitmer testified that the
26 claimant in the second hypothetical could also be an assembler (DOT#
27 734.687-018; sedentary; unskilled) for which there are 118,000 jobs
28 in the United States. Id. Finally, Mr. Whitmer testified that when

1 using the third hypothetical, the claimant could obtain but not
2 maintain employment due to the additional moderate mental
3 limitations. Id.

4 **3. Medical Records**

5 The undersigned judicial officer adopts the ALJ's summary of
6 the medical evidence and discusses the relevant medical reports and
7 opinions in the Analysis section below.

8 Plaintiff alleges disability due to a variety of physical and
9 psychological ailments. The ALJ's discussion and findings cover the
10 medically determinable impairments of an anxiety disorder, a rule-
11 out post traumatic stress disorder, headaches, right arm brachial
12 plexus compression, and cervical/thoracic/lumbar strains as well as
13 Plaintiff's other physical and mental complaints. (Tr. 15).

14 **ANALYSIS**

15 **A. The ALJ Properly Evaluated Medical and Mental Evidence** 16 **From Treating Physicians**

17 Plaintiff argues that the ALJ summarily rejected the opinions
18 of treating physicians, Drs. Richard Drew, C. Donald Williams, and
19 James Bailey, without convincing reasons. Ct. Rec. 15, at 16. At
20 the outset, the undersigned notes that neither Dr. Drew, Ph.D. nor
21 Dr. Williams, M.D. were treating physicians, but rather one-time
22 examining doctors for consultative exam purposes only (Tr. 16-17,
23 115-17, 166-70).

24 The Court disagrees with Plaintiff and finds that the ALJ did
25 consider and evaluate the medical and mental evidence opinions from
26 treating physicians. The ALJ properly considered Dr. Drew's
27 neuropsychological evaluation in April 1999 and his opinion that
28 Plaintiff's alleged memory difficulties could be the result of
anxiety, frustration, and depression that she was reporting. Dr.

1 Drew did not think it was necessary for her to undergo a more
2 complete neuropsychological evaluation or treatment (Tr. 116-17).

3 The ALJ also considered Dr. Williams' opinions from his
4 consultative examination in November 2002 in which he opined that
5 Plaintiff had a depressive disorder and an anxiety disorder with
6 moderate difficulties in social or occupational functioning (Tr. 17,
7 168-69). In weighing medical evidence, the ALJ noted that
8 Plaintiff's treating physician, Stephen Litchfield, D.O., released
9 her to work in September 1999 with the only limits being to avoid
10 kneeling, repetitive bending, and heavy lifting (Tr. 18).

11 After December 1999, the ALJ noted that Plaintiff had limited
12 medical treatment, seeing Dr. Litchfield on only one occasion in
13 January 2000 (tr. 19, 141) and had only intermittent treatment for
14 miscellaneous physical complaints, and failed to mention her
15 allegedly disabling back and neck problems (Tr. 162-65). Despite
16 allegedly disabling limitations, her physicians found at most mild
17 objective findings and observed no functional limitations (Tr. 115-
18 46, 162-70). Only conservative treatment was recommended.

19 The ALJ noted that Plaintiff's mental impairments, including
20 symptoms of depression and anxiety, have coincided with difficulties
21 in her personal relationship with her husband (purportedly ex-
22 husband at the present time). The ALJ noted that her abusive
23 marriage was the only stress she could identify to her physicians
24 that precipitated her emotional symptoms (Tr. 19, 147-61). The ALJ
25 also noted that Plaintiff was able to perform work activity and was
26 released to work in 1999 (Tr. 20).

27 In January 2000, Dr. Litchfield opined that her neck and back
28 impairments left her only 5% disabled and assigned her a minor

1 impairment rating (Tr. 20). Defendant asserts that other evidence
2 of record showed Plaintiff was capable of performing light to medium
3 work during the relevant period (Tr. 21). Further, Defendant points
4 out, the ALJ noted that no physician had opined that she was
5 disabled (Tr. 21). For these reasons, the ALJ properly considered
6 the medical evidence and opinions of these physicians.

7 With respect to Dr. James E. Bailey, Ph.D., a non-treating
8 State Agency physician, Defendant states that the ALJ adopted some
9 of the findings. Specifically, Defendant states the ALJ did not
10 adopt the State Agency physician's findings that the Plaintiff had
11 moderate limitations in the ability to understand and remember
12 detailed instructions or respond to changes in work settings (Tr.
13 17, 171-96). The ALJ did adopt the finding, though, that Plaintiff
14 can tolerate only limited public interaction (Tr. 23), which appears
15 to the Court to be supported by the evidence of record. Finally,
16 the ALJ noted that Dr. Bailey opined in December 2002 that there was
17 insufficient medical evidence to establish the existence of a
18 physical diagnosis (Tr. 26).

19 The ALJ clearly and fully evaluated and explained the medical
20 and mental evidence set forth in the record. As such, the ALJ
21 properly discharged his responsibilities.

22 **B. The ALJ's RFC and Step Five Findings Were Proper**

23 The ALJ determined that from the alleged onset date through
24 1999, Plaintiff retained the residual functional capacity to perform
25 light exertion work, lifting and carrying up to 20 pounds
26 occasionally, 10 pounds frequently, stand and/or walk for 6 hours in
27 an 8 hour workday and sit for up to 6 hours of an 8 hour workday.
28 As of 2000, the ALJ determined that Plaintiff retained the residual

1 functional capacity to perform medium work, lifting and carrying up
2 to 50 pounds occasionally, 25 pounds frequently, stand and/or walk
3 for 6 hours in an 8 hour workday and sit for up to 6 hours of an 8
4 hour workday. Further, the ALJ determined, Plaintiff could only
5 tolerate limited public interaction. (Tr. 23, Finding 6).

6 The ALJ, adopting the VE's testimony for the second
7 hypothetical, as discussed above, found that Plaintiff could perform
8 other work as a sack repairer or an assembler (Tr. 22).
9 Additionally, the ALJ found that it was highly likely that Plaintiff
10 could perform many other sedentary to medium jobs with limited
11 social interaction given that she actually has fewer limitations
12 than were presented to the VE at the hearing. Id.

13 Plaintiff argues that the ALJ's conclusion that she could
14 perform work available in significant numbers in the national
15 economy was based on the testimony of the vocational expert (VE), who
16 was not provided with a complete hypothetical. Ct. Rec. 15, at 17.

17 Defendant responds that the ALJ's residual functional capacity
18 [RFC] finding and vocational hypothetical question properly
19 accounted for all of Plaintiff's physical and mental limitations
20 that the ALJ found credible. Ct. Rec. 20, at 10. Defendant argues
21 that because the ALJ's RFC finding and vocational hypothetical
22 question reflected a proper clarification of the limitations
23 identified, his decision is free of legal error. Id.

24 1. Credibility

25 The Court next considers whether the ALJ determined Plaintiff's
26 credibility properly. Plaintiff essentially argues that the ALJ's
27 credibility findings were unsupported by substantial evidence in the
28 record.

1 An ALJ may undertake a credibility analysis when the medical
2 evidence regarding a claimant's disability is inconsistent. *Polaski*
3 *v. Heckler*, 739 F.2d 1320, 1322 (8th Cir.1984).

4 The Ninth Circuit has recognized that the ALJ is responsible
5 for determining credibility, resolving conflicts in medical
6 testimony, and for resolving ambiguities. *Andrews v. Shalala*, 53
7 F.3d 1035, 1039 (9th Cir.1995). The ALJ's findings, however, must
8 be supported by specific, cogent reasons. *Rashad v. Sullivan*, 903
9 F.2d 1229, 1231 (9th Cir.1990).

10 Unless there is affirmative evidence showing that the claimant
11 is malingering, the Commissioner's reasons for rejecting the
12 claimant's testimony must be "clear and convincing." *Lester v.*
13 *Chater*, 81 F.3d 821, 834 (9th Cir.1995) (internal quotation marks
14 omitted). "General findings are insufficient; rather, the ALJ must
15 identify what testimony is not credible and what evidence undermines
16 the claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
17 *Shalala*, 12 F.3d 915, 918 (9th Cir.1993).

18 The ALJ gave clear and convincing reasons for not finding
19 Plaintiff's testimony fully credible. The ALJ considered factors
20 such as Plaintiff's appearance and movements at the hearing;
21 observation by third parties and physicians regarding disability;
22 reported effectiveness of her medications; discrepancies between her
23 allegations of debilitating pain and disabling symptoms and the
24 medical evidence of record; daily activities; duration, frequency,
25 and intensity of the condition; and functional restrictions (Tr. 18-
26 20). The ALJ found numerous inconsistencies in the record,
27 particularly between Plaintiff's description of her inability to
28 work and the physical findings, including the lack of clinical or

1 laboratory findings. When the Plaintiff's subjective complaints are
2 contradicted and found not to be fully credible, a doctor's
3 repetition of the same suffers the same results. *Barker v.*
4 *Secretary of Health and Human Services*, 882 F.2d 1474, 1477 (9th Cir.
5 1989).

6 Plaintiff's daily activities (cooking; laundry; caring for her
7 children as well as other children; handling finances; housekeeping;
8 and attending part-time community college on a Pell grant)
9 demonstrate far greater residual functioning than she admits to
10 having, and reflect a normal level of daily activities, which the
11 ALJ noted in his decision (Tr. 20). Thus, the Court cannot say that
12 the ALJ erred in giving credence only to those subjective complaints
13 that were consistent with the objective medical evidence and
14 Plaintiff's daily activities.

15 **2. The ALJ Has Considered and Discussed Important Evidence**

16 Plaintiff replies that the ALJ has improperly rejected the
17 opinions of several physicians, which opinions should result in a
18 finding of disability based on VE testimony. Ct. Rec. 21, at 2.
19 Specifically, Plaintiff argues that when the VE was presented with
20 Dr. Bailey's assessment of mental limitations (Tr. 185-86), the VE
21 testified that although the claimant would be able to obtain
22 employment, she would not be able to sustain competitive employment
23 (Tr. 279). Finally, Plaintiff argues that the Defendant (via its
24 brief writer) has failed to provide any explanation as to why some
25 of the State Agency physicians' findings or limitations were not
26 adopted. Ct. Rec. 21, at 4.

27 An ALJ may accept some, but not all, that an expert says. See
28 *Magallanes v. Bowen*, 881 F.2d 747, 753 (9th Cir.1989). Likewise, an

1 ALJ may reject an opinion inferentially, even a treating physician's
2 opinion, if those inferences are there to be drawn. *Magallanes*, 881
3 F.2d 747 at 755. The ALJ here summarized the facts and conflicting
4 medical evidence in a detailed and thorough fashion, stating his
5 interpretation and making findings.

6 An ALJ need not provide a written evaluation of every piece of
7 evidence that is presented. *Pugh v. Bowen*, 870 F.2d 1271, 1278 (7th
8 Cir. 1989). "Instead, the ALJ must consider and discuss the
9 important evidence." *Anderson v. Bowen*, 868 F.2d 921, 924 (7th Cir.
10 1989). Having reviewed the record and Plaintiff's submissions, the
11 undersigned judicial officer concludes that Plaintiff has not
12 demonstrated that her claims should result in a finding of
13 disability. The undersigned judicial officer rejects Plaintiff's
14 claim that the ALJ's decision was legally inadequate at steps three
15 and five of the disability analysis.

16 CONCLUSION

17 The Court concludes that, because the ALJ's decision was based
18 on and supported by medical and mental evidence and was reached by
19 applying proper legal standards, the ALJ's findings and ultimate
20 determination on disability are conclusive. For the reasons
21 outlined above, the undersigned concludes that the Commissioner's
22 decision to deny Plaintiff DIB and SSI benefits was supported by
23 substantial evidence in the record and was based upon the proper
24 legal standards.

25 Accordingly,

26 IT IS HEREBY ORDERED:

27 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**) is
28 **DENIED.**

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and an Order of Judgment, forward copies to counsel, and close file.

LONNY R. SUKO
United States District Judge